

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

057

United States Court of Appeals
for the District of Columbia Circuit

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BRIEF FOR APPELLANTS AND JOINT APPENDIX

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 30 1967

No. 21,216

Nathan J. Paulson
CLERK

ERNESTINE PRATHER, NENNA MILLER JANSEN,
and J. GORDON FORESTER, JR.,
ADMINISTRATOR OF THE ESTATE OF
EDWARD R. McCONNELL, ALSO KNOWN AS
EDDIE BURL, DECEASED,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WALTER E. GILLCRIST
Attorney for Appellants

J. GORDON FORESTER, JR.
*Administrator of the Estate of
Edward R. McConnell*

1317 F Street, N.W.
Washington, D.C. 20004

(i)

QUESTIONS PRESENTED

1. Will this Court recognize a valid foreign equitable adoption.
2. Will this Court, in recognizing a valid foreign equitable adoption, clearly and convincingly proved, decree that the personal property of an intestate equitably adopted child shall be distributed in the same manner as a statutorily adopted child, rather than escheat to the District of Columbia.

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*APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLANTS
JURISDICTIONAL STATEMENT

Pursuant to the District of Columbia's answer to Amended
Petition for Letters of Administration in the Estate of Edward R.
McConnell, also known as, Eddie Burl, deceased, Administration

No. 115,192, and Objections to the First and Final Account of the Administrator, wherein Appellants, Ernestine Prather and Nenna Miller Jansen were the proposed distributees, a hearing was held by the United States District Court. Thereafter, on June 1, 1967 the Court filed a Memorandum Opinion and on June 2, 1967 entered an order sustaining the objections of the District of Columbia to said account (J.A. 13). On June 30, 1967, Appellants filed a notice of appeal (J.A. 14). This Court has jurisdiction by virtue of the Act of June 25, 1948, 62 Stat. 929 as amended, 28 U.S.C. §1291.

STATEMENT OF THE CASE

On June 10, 1965, Edward R. McConnell, known to the boxing world as, "Eddie Burl," became deceased, without doubt, unaware, that what little he left in this world would escheat to the District of Columbia, rather than become the property of the only family he had ever known (J.A. 1). Like many boys from families whose incomes were something less than substantial, Eddie McConnell, in his late teens turned to the world of professional boxing as the road to fame and glory.¹

Born December 19, 1908,² Edward R. McConnell entered the home of Arthur and Mamie McConnell, shortly after their marriage

¹Fighting in the featherweight division, Edward R. McConnell engaged in 118 professional bouts, winning 83, scoring 23 knockouts, 20 draws and 15 losses. *Pensacola News Journal*, Dec. 3, 1950, pg. 14.

²Edward R. McConnell's natural father is unknown. His natural mother, whose name is also unknown, apparently advised Arthur and Mamie McConnell of the date of his birth. The date used is taken from the Baptismal Record of St. Michael's Roman Catholic Church, Pensacola, Florida, where Arthur and Mamie McConnell took him to be baptized, as their child.

(J.A. 17).³ At this point, some eighteen months after his birth, he became part of a family, the basic unit of society (J.A. 17). Performing what is, perhaps, the greatest charitable act known to man, Arthur and Mamie McConnell adopted Edward, gave him their name, their love, their affection, and shared with him as well as Mamie McConnell's natural children what little they had to offer in the way of worldly possessions.⁴

As a small child, Edward McConnell was spoken of to outsiders as, "our brother," and "the baby" — "our mother's baby." (J.A. 16).

At the age of four (4), his adoptive parents brought him to St. Michael's Roman Catholic Church, Pensacola, Florida, and there declared to the whole world that he was their adopted son (J.A. 30). Pursuant to this baptism, Mamie and Arthur McConnell assumed the obligations, both secular and religious, of raising and educating their adopted son. Eddie McConnell was brought up in their faith (J.A. 18) and attended the same school as the other children (J.A. 18).

³Appellant, Ernestine Prather, is the natural child of Mamie McConnell. Her father died when she was a small child (J.A. 16). Appellant, Nenna Miller Jansen, is also the natural child of Mamie McConnell, whose father was married to Mamie McConnell prior to the marital union which gave birth to Ernestine Prather. Thus appellants are half-sisters.

⁴The Trial Court found:

It is an uncontested fact in the instant case that two people took a child into their hearts and home, and gave him the love, affection, shelter, and every other consideration afforded their natural offspring. What they had they shared with him in full measure. Likely their economic status was not such as to give rise to thoughts of inheritance. Mrs. Prather and Mrs. Jansen, the proposed distributees here, were known to the decedent as his sisters, members of the only family circle ever to hold him within its embrace (J.A.).

When he was sixteen years of age, Eddie McConnell obtained the reluctant permission of his mother (Mamie McConnell) to work for Western Union, although she extracted his promise to continue his education by attending night school. (J.A. 19).⁵ Thereafter he entered the world of professional boxing. Given the name, "Eddie Burl," by his manager, he fought throughout the country and sent money home to the family (J.A. 19, 20). On one occasion he sent his mother, Mamie McConnell, money to come to Mobile to see him fight. She went (J.A. 20).

In 1946 his adopted mother became deceased (J.A. 21).⁶ At this time, he was living in Washington, D.C., spending his vacations at Miami, Florida (J.A. 21, 22). His sisters, and their families, in turn, came to Washington, D. C. to see him (J.A. 21).

John Norton, Special Agent, World Insurance Company, knew Eddie McConnell for about eighteen years prior to his death (J.A. 25). While visiting Eddie at District of Columbia General Hospital, he met Jack Prather, Ernestine Prather's son, and was introduced to him by Eddie as his nephew (J.A. 28).⁷ Eddie McConnell applied for and received an accident sickness insurance policy, which John Morton wrote (J.A. 26-28). The application for insurance, bearing date of December 8, 1960, and the master index card of the World Insurance Company reflect that the beneficiary of this policy was Ernestine Prather, and the stated relationship was, "sister." (J.A. 28, 29).

A search of records failed to reveal that Arthur and Mamie McConnell statutorily adopted decedent, in the State of Florida.

⁵While working for Western Union, Eddie McConnell brought money home to his adoptive mother (J.A. 19).

⁶It is quite clear that Arthur McConnell predeceased Mamie McConnell.

⁷See Administrator's Exhibits Nos. 2, 3, and 4 (see Record).

With his demise, a petition for letters of administration was filed, wherein it was alleged that his only heirs at law and next of kin were appellants, Ernestine Prather and Nenna Miller Jansen, who were denominated half sisters by equitable adoption (J.A. 1, 2). Thereafter, the District of Columbia filed an answer to the amended petition for letters of administration,⁸ denying that appellants were heirs at law and next of kin of the decedent and claiming that the estate would escheat to the District of Columbia (J.A. 4, 5). A first and final account was filed by the Administrator wherein Ernestine Prather and Nenna Miller Jansen were listed as the sole distributees (J.A. 6). The District of Columbia filed objections thereto and the matter came on for hearing before United States District Judge Burnita Shelton Matthews (J.A. 6, 7).

Following a hearing, and having taken the matter under advisement, the Court filed a memorandum opinion (J.A. 7-13) and an order sustaining the objections of the District of Columbia (J.A. 13). From this order, Ernestine Prather, Nenna Miller Jansen and the Administrator, J. Gordon Forester, Jr., noted an appeal (J.A. 14).

STATUTES INVOLVED

16 D.C. Code Sec. 312 (1961 ed.)*

Legal effects of adoption.

(a) A final decree of adoption establishes the relationship of natural parent and natural child between adoptor and adoptee for all purposes, including mutual rights of inheritance and succession as if adoptee were born to adoptor. The adoptee takes from, through, and as a representative of his adoptive parent or parents in the same manner as a child by birth, and upon the death of an adoptee intestate.

⁸The Amended Petition for Letters of Administration differed from the original only with respect to the person whom the heirs at law and next of kin requested to be administrator.

*Supplement V, 1966.

his property shall pass and be distributed in the same manner as if the adoptee had been born to the adopting parent or parents in lawful wedlock. All rights and duties including those of inheritance and succession between the adoptee, his natural parents, their issue, collateral relatives, and so forth, are cut off, except that when one of the natural parents is the spouse of the adoptor, the rights and relations as between adoptee, that natural parent, and his parents and collateral relatives, including mutual rights of inheritance and succession, are in no wise altered.

19 D.C. Code Sec. 309 (1961 ed.)

Share of brother or sister of their descendants.

When the intestate leaves a brother or sister, or child or descendant of a brother or sister, and no child, descendant, or father or mother, the brother, sister, or child or descendant of a brother or sister is entitled to the whole.

19 D.C. Code Sec. 315 (1961 ed.)

No distinction between whole- and half-blood.

There is no distinction between the kindred of the whole- and the half-blood.

STATEMENT OF POINTS

1. The evidence adduced is clear and convincing that Edward R. McConnell was equitably adopted by Arthur and Mamie McConnell.
2. The implied contract of adoption, which became executed by all parties, except for the de jure adoption, was made and performed in the State of Florida, which state recognizes equitable adoptions.
3. The District of Columbia recognizes foreign equitable adoptions, although the principle of equitable adoption has not been adopted or declared invalid in the District of Columbia.

4. Edward R. McConnell was a domiciliary of the District of Columbia at the time of his death. On that date, District of Columbia law should control as to who, if any, are his heirs at law and next of kin.

5. As of the date of death of Edward R. McConnell, both Florida and District of Columbia law provides that with respect to statutory adoptions, natural children of the adopting parents can inherit from the adopted child.

6. This Court had never ruled on either the recognition of foreign equitable adoptions, or the quantum of recognition which will be given to such adoptions where the same are clearly and convincingly proved.

7. A new approach to the problem is necessary in order to see that justice is done. There are compelling reasons why a foreign equitable adoption, clearly proved, should be given that degree of recognition which would permit the natural children of the adopting parents the same rights of inheritance with respect to the adoptee as is granted under statutory adoption.

SUMMARY OF ARGUMENT

While the majority of States recognize the principle of equitable adoption, it has been heretofore limited to a judicial decree that the adopted child is entitled to share in the intestate estate of the adopting parent, because equity will deem done what ought to have been done. Such a decree is founded upon equitable jurisprudence involving either specific performance of a clearly proved contract of adoption, or equitable estoppel.

The Courts have drawn a fine distinction between such a decree and one placing a judicial imprimature upon the de facto adoption. Such trepidation is due, principally, to the facts that adop-

tion was unknown at Common Law, and thus any statute in derogation of the Common Law is strictly construed, and, under Common Law, heirship and descent of property were controlled by blood relationship.

The evidence in the instant case is overwhelming that Edward R. McConnell was equitably adopted by Arthur and Mamie McConnell. Florida law, the place of the implied contract and the place of performance, clearly recognizes equitable adoption. Although the District of Columbia has not determined whether or not to give effect to equitable adoption, it does recognize equitable adoptions occurring in other jurisdictions. Under both Florida and District of Columbia law in effect as of the date of death of decedent, Appellants, sisters of the decedent for all intents and purposes, would inherit from his estate, if his adoption had been *de jure* rather than only *de facto*.

To recognize equitable adoptions but only for the purpose of protecting the adoptee is manifestly unjust. Drawing a distinction between a right to issue a decree that the adoptee is entitled to share as a distributee of the adopting parents' intestate estate, but not to give *de jure* recognition to the equitable adoption, stresses form over substance and is unjust to the natural children of the adopting parent who are, even in equity, faultless and with clean hands.

This Court should give the same recognition to an equitable adoption, which is clearly proved, as the legislature has given to a statutory adoption, that is, that the natural children of an adopting parent may mutually inherit from the adopted child.

ARGUMENT

Despite overwhelming evidence which would support a finding of equitable adoption of the decedent by his adopting parents, a legal fiction, turning upon fine distinctions, stressing form over substance, compelled the District Court to deny heirship to decedent's two sisters, members of the only family he had ever known.

The concept of adoption, established under Roman Law and in Civil Law nations, was unknown to the Common Law.⁹ Another concept which affects the law pertaining to the instant case, is the Common Law's rule of primogeniture, and its emphasis on the descent of property only to blood kin. Our forefathers, in the Massachusetts Bay Colony were quick to strike at the heart of both these Common Law concepts.¹⁰ But, the legal profession quickly adopted a rule that statutes in derogation of the Common Law must be strictly construed. The emphasis of these concepts and rules had their effect on the judiciary.

Cases began to come before the courts of instances where adoptions in fact, but not in law, had occurred. With the demise of the adopting parents, intestate, the de facto adoptee was being deprived of any right to distribution in the estate. To remedy this situation, the courts construed the concept of equitable adoption.¹¹ Sitting as courts of equity they required clear and convincing proof of the existence of a contract between the natural parent and the adopting parent which provided that the child would be adopted and in some cases would have a right to share in the estate of the adopting

⁹ *In Re Jarboe's Estate* (U.S.D.C. D.C.), 235 F. Supp. 505 (1964).

¹⁰ Haskins, *Law and Authority in Early Massachusetts* (1960), pg. 170; see also the *First Compilation of Laws, Massachusetts*, 1642.

¹¹ The terms virtual adoption, de facto adoption and adoption by estoppel are synonymous as to the idea, but not the manner of the remedy.

parent.¹² Applying the tools of specific performance or equitable estoppel,¹³ they applied the equitable maximum that equity would do what should have been done, holding that the child would be entitled to share as a distributee in the intestate estate of its adopting parent. But since adoption was unknown to the Common Law and adoptions statutes were in derogation of the Common Law, with the additional emphasis on blood kin, the courts drew a fine distinction in arriving at their conclusions. They held that while they had the authority, under equitable principles, to recognize the adopted child as the distributee of the intestate estate of the adopting parent, they were without authority to declare the de facto adoption a de jure adoption.¹⁴ These holdings emphasized the fact that the adopting parents had breached the contract in that they had failed to obtain a statutory adoption. This leads to the logical extension that the natural descendants of the adopting parents could not inherit from the adopted child, because they could stand in no better relationship than their adopting parents. Equity would certainly not aid one who had breached the contract of adoption. *Heien v. Crabtree*, supra.

This is the problem we face in the instant case.

Conflict of Law Problems

The evidence adduced in this cause clearly manifests that the contract of adoption, which we may infer,¹⁵ was made in Florida and performed in Florida. Equitable adoptions occurring in other

¹² *In re Jarboe's Estate* (USDC D.C.) 235 F. Supp. 505, etc. 508 (1964).

¹³ Texas appears to be the foremost proponent of equitable estoppel, *Heien v. Crabtree*, 369 S.W. 2d 28 (1963).

¹⁴ *Besche v. Murphy*, 59 A.2d 499. See Note, 10, Md. L.R. 72.

¹⁵ *Roberts v. Roberts*, 8th Cir., 223 F. 775 (1915).

jurisdictions are recognized. *In Re Jarboe's Estate*, supra, *Estate of Linnie Gee Finney*, Administration No. 81052 (decision unreported). *In Re Gray's Estate* (USDC D.C.), 168 F. Supp. 124 (1958).

The District of Columbia has not adopted the doctrine of equitable adoption for this jurisdiction, as yet. *Epstein v. Mescher*, 118 U.S. App. D.C. 142, 333 F.2d 152 (1964). This would, however, not prevent the Court from recognizing a foreign equitable adoption, particularly where it occurred prior to the present District of Columbia adoption statute.¹⁶

It is equally obvious, that there is no public policy in the District of Columbia which would forbid the recognition of equitable adoption status. *In Re Gray's Estate*, supra.

With respect to the right to inherit, the Courts of the District of Columbia have held that District of Columbia law controls and it is the law in effect, as of the date of death of the person from whom the inheritance is claimed. *In Re Gray's Estate*, supra, at 126, *In Re Jarboe's Estate*, supra at 506.¹⁷

Florida Law Recognizes Equitable Adoption

In *Sheffield v. Barry*, 153 Fla. 144, 14 So. 2d 417 (1943), Florida recognized for the first time, equitable adoption. They held that an adopted child, even though an adult, could enforce an oral contract of adoption made by the adopting parents with the natural parent. The Court, recognizing a fine distinction, by way of obiter dictum, stated that they could adjudicate her rights to share in her

¹⁶It would appear that there is no constitutional problem of full faith and credit with respect to the recognition or nonrecognition of equitable adoption under Florida Law.

¹⁷Cf. *Hall v. Scarlett*, 86 U.S. App. D.C. 166, 181 F.2d 277, cert. den. 341 U.S. 925, 95 L. Ed. 1357, 71 S.Ct. 796 (1950).

adopting father's intestate estate, the same as if a de jure adoption had in fact occurred. The Court itself, stated initially that it was not impressed with the adopting child's case until subsequent examination of the law throughout the country persuaded them of the validity of the child's claim.

Subsequently, in *Roberts v. Caughell*, 65 So. 2d 547 (1953), the Court, once again, held that two minor children were entitled to enforce the agreement to adopt, in equity, with respect to their property rights in the intestate estate of the adopting parent. The Court noted, however, that primary concern was not whether the legal technical requirements had been met.¹⁸

Under Florida law in effect at the time of the death of the decedent, Edward R. McConnell, the natural children of an adopting parent could inherit from an adopted child who died intestate. Cf. *In Re Levy's Estate*, 141 So.2d 803 (1962). The same, of course, would be true in the District of Columbia, were a de jure adoption involved. Title 16, Sec. 312, District of Columbia Code, 1967 edition (Title 16, Sec. 222, District of Columbia Code, 1961 edition).

Natural Children of De Facto Adopting Parents Should Be Able To Inherit From the Intestate Estate of the Adopted Child

It is true that *Heien v. Crabtree*, supra and *Rumans v. Lightizer*, 363 Mo. 125, 249 S.W. 2d 397 (1952), have held that the natural kin of an adopting parent cannot inherit from the adoptee where only a de facto adoption has occurred. It is also true, that several courts,¹⁹ despite the maxim that equity will do complete jus-

¹⁸ *Roberts v. Caughell*, supra, at 548.

¹⁹ *Eg. Stith v. Willis*, 219 Ga. 62, 131 S.E. 2d 620 (1963).

tice, have indicated by dictum that they cannot declare the status of a de facto adoption as de jure, although they can in equity declare an adopted child to be entitled to share in the estate of a de facto adopting parent.

It is respectfully submitted that this fine distinction is a carry-over from those concepts that statutes in derogation of the Common Law will be strictly construed and that property should descend according to blood lines. These concepts had their carryover in early adoption legislation, but in recent years, there has been a definite trend to make the de jure adopted child the same as a natural child of the adopting parents for all purposes.²⁰

To argue, as one must logically do, that the natural children of the de facto adopting parents must stand in the same shoes as their parents and, their parents, having breached the adoption contract, are thus not entitled to any relief, is to do manifest injustice. As pointed out hereinbefore, the act of giving a stranger — child one's name, love, and affection, and raising him as one would their natural children, considering him to be adopted, is probably the most charitable act that a human being can perform. To argue that the parent has breached his contract, by merely failing to obtain the statutory adoption, and to treat him as one not entitled to seek the aid of equity is grossly unfair. Moreover, to visit upon the natural children of the de facto adopting parent, the sin of failing to obtain a statutory adoption, is even more reprehensible.

The cases indicate that courts fear the recognition of a de facto adoption as de jure, would cause a multiplicity of suits of a fraudulent nature. But are not the courts themselves well able to cope with such situations? Furthermore, in this day and age, statutory adoptions are on the increase, and it may well be that equitable or virtual adoptions will gradually fade away.

²⁰See, e.g., the present District of Columbia adoption statute, 16 D.C. Code Sec. 301 (1967).

The results of failing to hold that the equitable adoption is a de jure adoption by judicial decree has many harsh results. In the instant cause, escheat to the District of Columbia will result.²¹ In other cases, one may find that the adopting parent may make gifts to the adopted child, and upon his death, and the death of the adopting parents, the property will not pass to the natural heirs of the one making the gift.²²

It would seem that it is not illuminating to approach this problem by reference to well-worn legal slogans. *Kosty v. Lewis*, 115 U.S. App. D.C. 343, 319 F.2d 744, at 748 (1963). A new approach is necessary.

It is respectfully submitted that this Court in order to do complete justice, may recognize the equitable adoption of Edward R. McConnell in Florida, and declare that his half sisters, who have done no wrong, and who have loved, cared for, and treated him with affection as a brother, from the date he was first brought into the family circle, have the same rights of inheritance from his estate as do half sisters of de jure adopted children in the District of Columbia.

²¹ Certainly equity abhors an escheat. For the history of escheat see Note, 61 Col. L.R. 1319.

²² Note, 18 S.W.L. Journal 146.

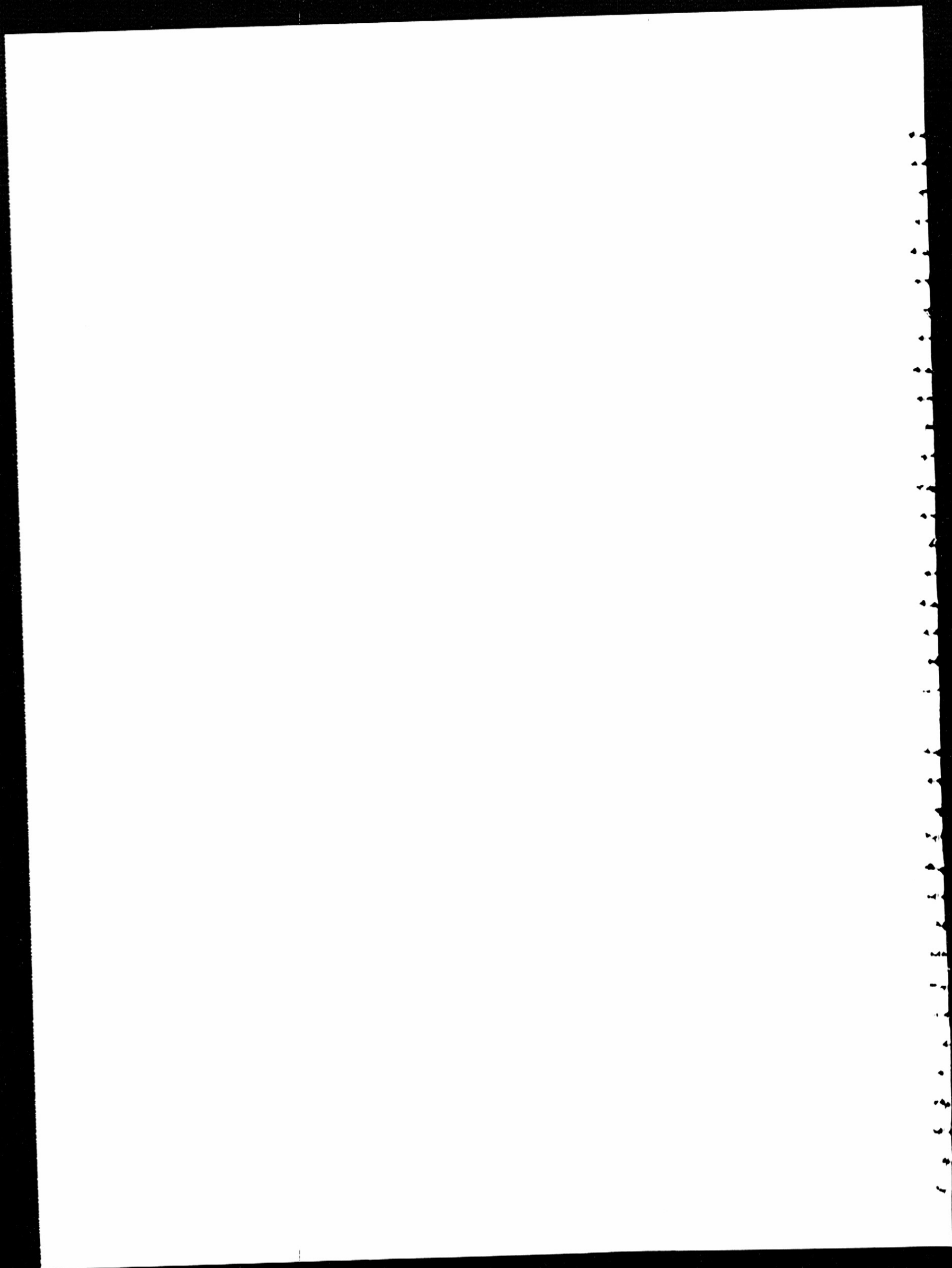
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the United States District Court for the District of Columbia sustaining the objections of the District of Columbia to the First and Final Account of the Administrator of the Estate of Edward R. McConnell should be reversed.

Respectfully submitted,

Walter E. Gillcrist
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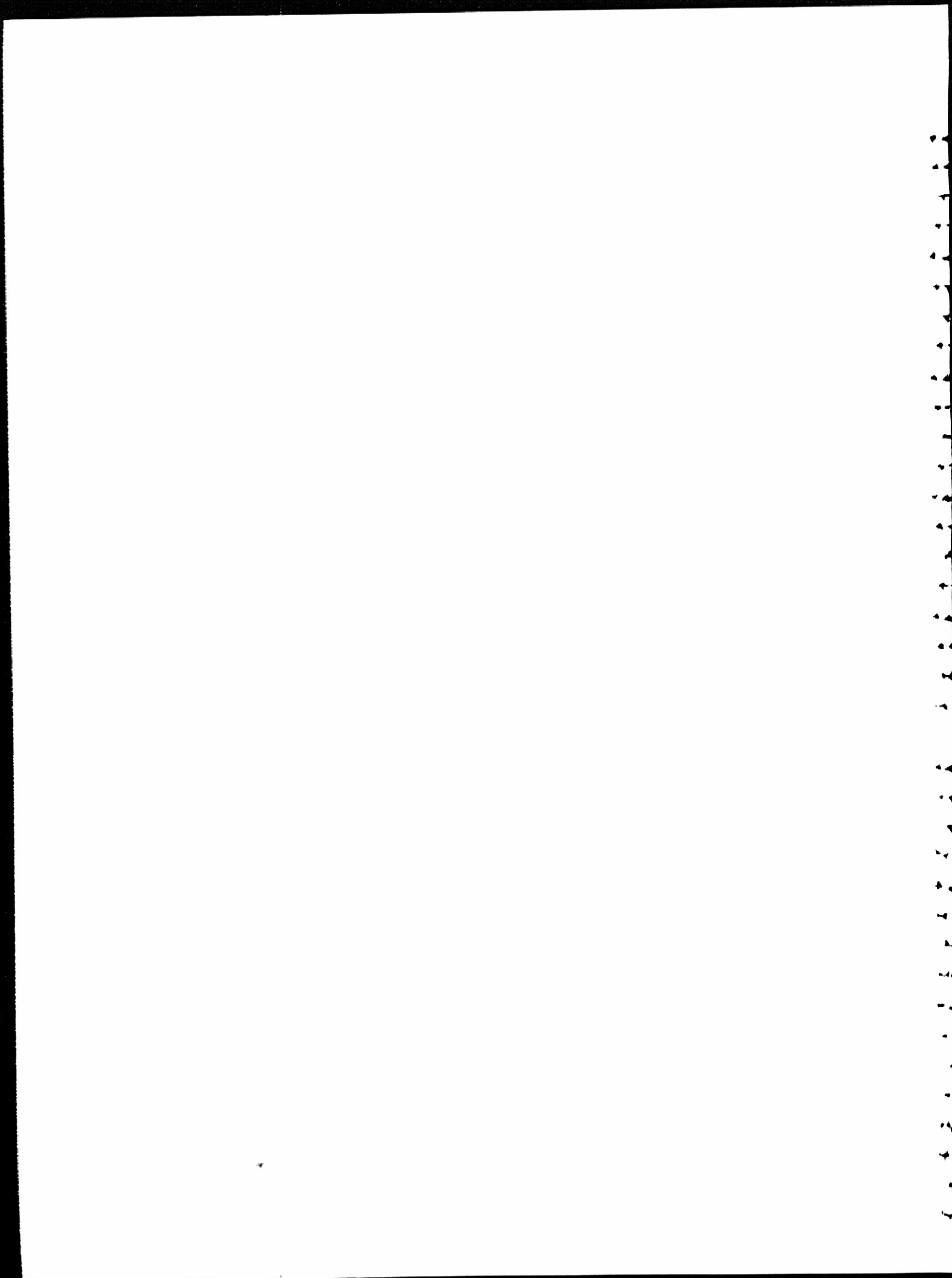
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Washington, D. C. 20004
*Administrator of the Estate of
Edward R. McConnell*



(i)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding Probate Court

In re:

ESTATE OF EDWARD R.
McCONNELL, also known as
Eddie Burl,

Deceased

Administration No. 115,192

Address of Petitioner:

3257 S. West 58th Avenue
Miami, Florida

PETITION FOR LETTERS OF ADMINISTRATION

The petition of Ernestine V. Prather respectfully represents to this Court:

1. That your petitioner is an adult citizen of the United States and a resident of the State of Florida and files this petition as an heir at law of Edward R. McConnell, the above named decedent.
2. That said Edward R. McConnell was a citizen of the United States and a resident of the District of Columbia and departed this life on the 10th day of June 1965 in the District of Columbia. Your petitioner has made diligent search and inquiry for a will of said decedent and has neither found one nor obtained any information that there was one, and verily believes that the decedent died intestate.
3. That the decedent left him surviving your petitioner, Ernestine V. Prather, an adult half sister by equitable adoption, being the surviving natural child of Mary Ann McConnell, the mother of the deceased by equitable adoption; and, Nenna Miller Jansen, residing

at 33 Eucalyptus Drive, Hialeah, Florida, an adult half sister by equitable adoption of the deceased, being the surviving natural child of Mary Ann McConnell, the mother of the deceased by equitable adoption. There is no spouse, child or descendant, parent, brother or sister, or child of a deceased brother or sister, or aunt or uncle of the decedent. If there be any other heirs at law, it is unknown to the petitioner.

4. That the decedent left no real estate, nor interest in any real estate in the District of Columbia or elsewhere.

5. That the decedent left personal property located in the District of Columbia estimated at \$19,400.00 and consisting of the following:

Stock	\$ 6,400.00
Savings Account	2,000.00
Government Insurance	7,000.00
Government Benefits	<u>4,000.00</u>
	\$19,400.00

6. The decedent left debts estimated at less than \$2,000.00, including a funeral bill in the amount of \$1,000.00.

7. That your petitioner is advised that as decedents heir at law she is entitled to apply for Letters of Administration to issue to James B. Lynn, 2814 31st Street, S.E., Washington 20, D.C.; and, the other known heir at law of the decedent, being adult, has executed a consent to the appointment of James B. Lynn as Administrator.

WHEREFORE, the premises considered the petitioner prays:

(1) That notice by publication shall issue directed to the unknown heirs at law and next of kin.

(2) That Letters of Administration be granted to James B. Lynn upon his filing an undertaking in an amount approved by the Court for the faithful performance of his trust.

JA 3

(3) That the Court grant petitioner such other and further relief as the Court may deem just and proper.

Ernestine V. Prather

Consent:

James B. Lynn

J. Gordon Forester, Jr.
Attorney for Petitioner
401 Tower Building
Washington, D.C. 20005
DI 7-2626

ORDER GRANTING ADMINISTRATION

Upon consideration of the petition of Ernestine V. Prather filed herein the 19th day of October, 1965, and the Amended Petition filed herein on January 19, 1966, that Letters of Administration issue to J. Gordon Forester, Jr.; and, it appearing to the satisfaction of the Court that Edward R. McConnell, deceased, departed this life intestate; and, it appearing that all known heirs at law and next of kin have filed their consents herein; and, it appearing that publication has been completed against the unknown heirs at law and next of kin, it is, by the Court, this 20 day of January 1966,

ADJUDGED, ORDERED, AND DECREED that J. Gordon Forester, Jr. be and the same hereby is appointed Administrator of the Estate of Edward R. McConnell, deceased, and that Letters of Administration on said estate issue to J. Gordon Forester, Jr. upon his filing an undertaking, with security approved by the Court, in the sum of \$21,000 dollars, conditioned for the faithful performance of the trust in him reposed; provided that J. Gordon Forester, Jr., first files a Power of Attorney required of non-residents by Section 2C-118 of the District of Columbia Code.

JUDGE

**ANSWER OF DISTRICT OF COLUMBIA TO AMENDED
PETITION FOR LETTERS OF ADMINISTRATION**

Comes now the District of Columbia, a municipal corporation, by and through its attorneys, and in answer to the Amended Petition of Ernestine Prather filed herein January 20, 1966, a copy of which was not served on said District, avers as follows:

1. The District of Columbia has no objection to the appointment of J. Gordon Forester, Jr., Esquire, a member of the bar of this Court, as administrator of the estate of the above-named decedent.

2. It appears from the aforesaid amended petition, and this respondent believes, therefore avers that the decedent above-named was survived by no spouse, children or other relatives within the fifth degree of consanguinity as defined by applicable law, and that the surplus of the decedent's estate, after the payment of costs of administration, allowable funeral expenses and just debts, is distributable to the District of Columbia as escheatee.

3. This respondent denies that Ernestine Prather and Nenna Miller Jansen, described in said petition as equitably adopted sisters of the decedent, are entitled to the surplus of his intestate estate.

WHEREFORE, the District of Columbia prays as follows:

1. That it receive notice of all future proceedings herein including the presentation of the administrator's final account.

2. That there be distributed to it as escheatee the surplus in the estate of the decedent after the payment of all costs of administration, allowable funeral expenses and just debts.

3. That the Court grant such other and further relief as to it may seem proper in this case.

/s/ Charles T. Duncan
CHARLES T. DUNCAN
Corporation Counsel, D. C.

/s) Una Rita Quenstedt
UNA RITA QUENSTEDT
Assistant Corporation Counsel, D.C.

/s/ Edmund L. Browning, Jr.
EDMUND L. BROWNING, JR.
Assistant Corporation Counsel, D.C.
Attorneys for District of Columbia

OBJECTIONS TO ACCOUNT

Comes now the District of Columbia, by and through its attorneys, and objects to the account of the administrator of the above-entitled estate for the following reasons:

1. The District objects to the proposed distribution of the surplus of the estate to Ernestine V. Prather and Nenna Jansen, upon the ground that they are not heirs-at-law or next of kin of the decedent, and therefore not entitled to share in his estate.

2. The District of Columbia believes, therefore avers, that the estate of the above-named decedent has escheated to the District of Columbia.

OPPOSITION TO OBJECTIONS TO THE FIRST AND FINAL ACCOUNT

Comes now the Administrator of the Estate of Edward R. McConnell in opposition to the objections of the District of Columbia to the first and final account, and as reasons therefor, states as follows:

1. The first and final account is correctly stated in that the proposed distribution is to the only known surviving heirs in law and next of kin of the deceased, being Ernestine V. Prather and Nenna Miller Jansen, half-sisters of the deceased by equitable adoption.

2. The facts and the law in support of this distribution are set forth in detail in a memorandum of points and authority attached hereto.

WHEREFORE, the Administrator prays that the objections to the first and final account be denied.

[Filed June 1, 1967]

OPINION

J. Gordon Forester, Jr., for the Estate.

Charles T. Duncan, Corporation Counsel, District of Columbia, Una Rita Quensted and Edmund L. Browning, Jr., Assistant Corporation Counsel, District of Columbia, Attorneys for District of Columbia.

To the first and final account of the administrator of the estate of the decedent, Edward R. McConnell, the District of Columbia has interposed an objection. The ground of the objection is that the administrator proposes to distribute the decedent's estate to Ernestine V. Prather and Nena Miller Jansen, that they are not heirs at law and next of kin of the decedent, and that the estate in question has escheated to the District of Columbia.

Born in Pensacola, Florida, on December 19, 1908, the decedent died intestate in the District of Columbia in 1965. His natural father was unknown. His mother left him as an infant with Mamie and Arthur McConnell who reared him as their own child. They gave him the family name of McConnell, and provided for his education, both secular and religious.

When the decedent was almost five years old he was baptized at St. Michael's Catholic Church in Pensacola, and described as the "adopted child of Arthur McConnell and Mamie McConnell." They are both dead, and it is unknown whether they agreed with the decedent's natural mother that they would formally adopt him. No court record has been found reflecting such an adoption.

The distributees listed by the administrator in his final account — Mrs. Prather and Mrs. Jansen — are natural children of Mrs. McConnell, and were reared as sisters of the decedent. When the decedent applied for an insurance policy in 1960 he listed Mrs. Prather as the beneficiary, and described her as his sister. The administrator refers to Mrs. Prather and Mrs. Jansen as “half-sisters of the deceased by equitable adoption”, and as deceased’s only heirs at law and next of kin. On the other hand, the District of Columbia contends that the alleged half-sisters have no interest in the estate, and that it has escheated to the District.

Florida being the situs of the alleged adoption in this case, the law of that state on equitable adoption has significance. The leading Florida case bearing thereon is *Sheffield v. Barry*, 14 So. 2d 417, Supreme Court of Florida, 1943. Involved there was a contract between the child’s natural mother and the foster parents whereby the foster parents would adopt the child as their own. The child was treated and considered by her adoptive parents throughout their lives as their daughter and was by them represented to the community as being their lawfully adopted daughter. Similarly the adoptive parents represented to the child that she bore such a status. It was not until both adoptive parents were dead that the child learned that no proceedings had ever been instituted to effect the adoption. She sued for specific performance of the adoption contract to entitle her to participate in the intestate estate of her foster father. Under these circumstances, the court recognized the concept of an equitable adoption so as to allow the adoptee to inherit as a natural child.

It is clear from the case cited that Florida recognizes an equitable adoption. Had Edward R. McConnell, the decedent here, survived his foster parents and proved an adoption contract between his natural mother and his adoptive parents (Arthur and Mamie Mc-

Connell), he could have successfully claimed a portion of any intestate estate left by such adoptive parent or parents, even though formal adoption was never consummated.

However, the situation presented in the instant case is different. The question here is whether the natural children of the foster parent may inherit from the adoptee (Edward R. McConnell) where the statutory proceedings of formal adoption have never been met. In order for Mrs. Prather and Mrs. Jansen to be able to inherit from the adoptee (Edward R. McConnell), it would seem that their natural parent, Mamie McConnell, through whom they claim, must have been able to inherit from the adoptee. The Florida Supreme Court in *Sheffield v. Barry* made it clear that what it was doing was not establishing an adoption, but, under the maxim "equity regards that as done which ought to have been done," was enforcing the adoption contract to secure for the adopted child a share in the estate of an intestate foster parent.

The case of *Heien v. Crabtree*, 369 S.W. 2d 28, Supreme Court of Texas, 1963, is factually similar to the case at bar. There Frank and Rosa Frei, husband and wife, had allegedly agreed with the mother of an illegitimate boy that they would legally adopt him. Such an adoption did not take place but the child made his home with Mr. and Mrs. Frei until he was 22 years of age, and was known as R. F. Frei. He died unmarried and intestate, Mr. and Mrs. Frei having predeceased him. The estate of R. F. Frei was claimed by the heirs of Mr. and Mrs. Frei. In affirming a judgment that such heirs take nothing, the Supreme Court of Texas said in part:

Here, the heirs of Frank and Rosa Frei are asserting a right of intestate succession to the estate of R. F. Frei. They could discharge that burden by alleging and proving that R. F. Frei was either a natural child or an adopted child of Frank and Rosa Frei through whom they claim. Admittedly he was neither.

But petitioners contend that the doctrine of estoppel in pais should be applied both ways; that inasmuch as they would be estopped to assert that R. F. Frei was not an adopted child if he had survived Frank and Rosa and had sought to establish a right of inheritance to their estates, the administrator of his estate should be estopped to assert that he was not an adopted child when they, as heirs of Frank and Rosa, seek to establish a right of inheritance to his estate. They assert that on this theory they have alleged a right of succession. How can that be? Petitioners' rights can be no better or higher than the rights of those through whom they claim. If Frank and Rosa had survived R. F. and were seeking to establish a right of succession to his estate, they would not be heard to claim the aid of equity. Through neglect or design they breached their agreement to adopt. More than that, there would be no basis in promises, acts or conduct on the part of R. F. upon which to erect an estoppel. Neither he nor his mother breached a duty to Frank and Rosa or in any way misled them to their detriment.*

Another case in point is that of *Rumans v. Lighthizer*, 363 Mo. 125, 249 S.W. 2d 397, where the Supreme Court of Missouri said at page 401:

An equitable adoption functions to enforce the rights of the child under the agreement to adopt. The child is not chargeable with the adoptive parent's failure to record the deed, and the enforcement in equity of the agreement to adopt should not confer additional rights upon the adoptive parent. The right of inheritance from the child is a different right from that of the child to enforce the agreement to adopt. *** [A] legal or stat-

*The dissenting opinion of GREENHILL and SMITH, JJ., as well as the Texas Code provisions cited therein indicate that the court might well have decided the case the other way. *Heien v. Crabtree*, 369 S.W. 2d 28, at page 32.

utory adoption, binding on all persons in accord with the statutory provisions, differs from an equitable adoption, which is based upon contract for the protection of the child and binding on the parties or those in privity with them, ***.

In the District of Columbia there are several court decisions touching on equitable adoption.

There is an unreported decision of the United States District Court for the District of Columbia in Estate of Linnie G. Finney, Administration No. 81,052 (1954), where it was held that, as the prospective parents had contracted with a foundling home in 1892¹ to adopt the child, had taken him into their household and treated him as a member of the family, he should be treated as though he had been adopted, even though formal adoption was never consummated, and this being the case, "his son is in turn entitled to inherit through him and succeeds to his rights."

In Epstein v. Mesher, 333 F.2d 152, 118 U.S. App. D.C. 142 (1964), Mrs. Epstein, alleging that she was the adopted daughter of Jacob Voronoff by equitable adoption, had filed a caveat to set aside his will, and his executrix had moved to dismiss the caveat on the ground that Mrs. Epstein was not a "person in interest" so as to be entitled to file a caveat. The trial court held that the District of Columbia statutes relative to the legal adoption of children create an exclusive method for such adoption, found that Mrs. Epstein had never been legally adopted, and consequently dismissed her caveat. On appeal, while the trial court was affirmed, the appellate court stated in part:

We need not and do not decide whether the statutory method of adoption is exclusive, or whether the doctrine of equitable adoption also prevails in the District of Columbia because under either, Mrs. Epstein must

¹There was no adoption statute in the District of Columbia at that time.

fail: there was no promise or contract to adopt which would support her equitable adoption theory and, admittedly, there was no statutory adoption.

The District of Columbia case of *In Re Jarboe's Estate*, 235 F. Supp. 505 (1964), is similar to the instant case, in that in each the estate of an alleged adoptee is claimed in whole or in part by a descendant of the alleged adopting parent. The two cases differ in that in the instant case the daughters of Mrs. McConnell, the alleged adopting parent, claim the estate of which their alleged brother died *intestate*; whereas in the Jarboe case the granddaughter of the alleged adopting parent claimed an interest in an estate of which Mr. Jarboe, the alleged adoptee, died *testate*. The claimant there asserted that as the niece of Mr. Jarboe she possessed the right to challenge his will on the ground that he was not of sound mind when he made it, and, should her challenge prove successful, to share in his estate. The decision of the court in Jarboe was that, assuming there was an equitable adoption of the adoptee, this would not give him the status of one legally adopted nor would it confer on the alleged niece any right to contest his will or to share in his estate.

It is an uncontested fact in the instant case that two people took a child into their hearts and home, and gave him the love, affection, shelter, and every other consideration afforded their natural offspring. What they had they shared with him in full measure. Likely their economic status was not such as to give rise to thoughts of inheritance. Mrs. Prather and Mrs. Jansen, the proposed distributees here, were known to the decedent as his sisters, members of the only family circle ever to hold him within its embrace. Yet the law is not kindly disposed toward claims to the estate of a deceased adoptee where they are made by the heirs of an adoptive parent who did not take legal steps to formalize the adoption. The Florida case, *Sheffield v. Barry*, 14 So. 2d 417, relied on by the administrator

does not support his proposal to distribute the decedent's assets to Mrs. Prather and Mrs. Jansen. This is because the Florida court specifically stated that it was not establishing an adoption but merely enforcing an adoption contract at the behest of an adoptee as against the estate of an intestate adoptive parent. Neither that case nor any District of Columbia case touching on equitable adoption is a precedent for a decree by this Court approving distribution of the estate of a deceased adoptee to the heirs of an adoptive parent who did not legally consummate the adoption. Accordingly, the objection of the District of Columbia to the account of the Administrator is sustained.

/s/ Burnita Shelton Matthews
Judge

June 1, 1967

[Filed June 2, 1967]

**ORDER SUSTAINING OBJECTION
TO FIRST AND FINAL ACCOUNT**

Upon consideration of the objection of the District of Columbia to the first and final account of the administrator herein, the response of the administrator thereto, and after hearing oral argument of counsel in support of and in opposition to said objection, it is by the Court this 2nd day of June 1967:

ORDERED That the objection of the District of Columbia to the account of the Administrator be and is hereby sustained.

/s/ Burnita Shelton Matthews

[Filed June 30, 1967]

NOTICE OF APPEAL

Notice is hereby given this 3d day of June, 1967, that Ernestine Prather, Nenna Miller Jansen and J. Gordon Forester, Jr., Administrator, Estate of Edward R. McConnell, a/k/a Eddie Burl, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 2nd day of June, 1967 in favor of District of Columbia against said Ernestine Prather, Nenna Miller Jansen and J. Gordon Forester, Jr., Administrator of Estate of Edward R. McConnell, a/k/a Eddie Burl.

/s/ Walter E. Gillcrist

[Excerpts of Transcript of Proceedings, March 10, 1967]

* * *

[2] ERNESTINE PRATHER

was called as a witness and, having been first duly sworn, was examined by counsel and testified as follows:

DIRECT EXAMINATION

BY MR. FORESTER:

Q. *** First would you give us your full name and address?

A. Ernestine V. Prather, 3267 Southwest Fifty-eighth Street, Miami, Florida.

Q. Mrs. Prather, you are the petitioner in this case involving the estate of Edward R. McConnell, is that correct? A. Yes.

Q. Mrs. Prather, would you tell us the relationship which you

had between yourself and the deceased, Eddy McConnell? A. Well my mother adopted him when he was about eighteen months old.

* * *

[3] Q. All right — now can you recall when Edward McConnell first came to live in your home? A. Oh, yes.

Q. About how old were you at that time? A. About nine or ten years old — nine, I will say.

Q. And were there any other children in the family at that time? A. My sister.

Q. And what is her name? Her full name? A. Nina Jansen, Nina Jansen Miller.

Q. Now you say that Mr. McConnell came to live at your home when you were about nine years of age? A. Yes.

Q. And he was about eighteen months old? A. At that time, yes.

Q. Mrs. Prather, could you tell us just what you can recall at this time when he first came to your home? A. Well we were so happy to have him, and we took him in the home as our brother — my mother's own child, and we [4] loved him and, I don't know —

Q. Did you help to care for Eddy when he came to your home? A. Yes, I did.

Q. And Mrs. Prather, would you tell us if you can recall the relationship between your mother, Mrs. McConnell, and Eddy. For example, did she ever punish him? A. Oh, yes. She punished him as well as she did us, my sister and I. She wanted to raise him in the proper manner and so she made him mind her just as she did us.

Q. Mrs. Prather, can you recall overhearing any conversations or discussions among the adults in your family as to why Eddy was brought into the home? A. No — my mother was kind of old-fashioned and she never talked in front of the children.

Q. In other words, there was no discussion in your presence?
A. No.

Q. Mrs. Prather, considering your relationship with Eddy and with your parents in the home, can you tell Her Honor how this relationship to Eddy was held out to other people – outsiders coming into the home – how Eddy was spoken of? [5] A. He was spoken of as our brother, and our baby to everyone.

Q. I see.

THE COURT: "Our baby" – who do you mean by that?

THE WITNESS: Well our mother's – my mother's baby.

And as a child like the rest of the family, he was.

THE COURT: All right.

BY MR. FORESTER:

Q. Mrs. Prather, as Eddy was growing up, to your knowledge was he ever informed or did he find out about your mother not being his natural mother? A. Well he did, but someone told him and he –

THE COURT: (Interposing): What was the name of your father and mother?

THE WITNESS: My father and my mother was Merlin.

THE COURT: Merlin what?

BY MR. FORESTER:

Q. Well, would you tell Her Honor your natural mother's full name? A. Mary Ann.

THE COURT: Mary Ann what?

THE WITNESS: Merlin.

BY MR. FORESTER:

Q. And then what was your natural father's full name? [6] A. His name – he died when I was a small child and I don't remember too much about him.

THE COURT: Well don't you remember his sur name?

THE WITNESS: His name was Joe – Joseph Merlin.

BY MR. FORESTER:

Q. How do you spell his last name? A. Merlin. M E R L I N.

Q. Merlin? A. Yes.

Q. Did there come a time after this when your mother, Mrs. Prather, Mary Ann Merlin, married Arthur McConnell? A. Yes, there was.

Q. And was this prior to the time that Eddy McConnell was brought into the home? A. Yes. My mother married Arthur McConnell — and to make a home for my sister and I and Eddy.

Q. Now Mrs. Prather, the full name of the deceased was Edward Rumont McConnell, is that correct? A. Yes.

Q. Was he ever known by any other name — not counting Eddy Berle, because we will get to that in a minute, but any other name while he was in the family? [7] A. Edward Rumont McConnell.

* * *

THE COURT: When Mr. McConnell first came [8] into your home your father, Mr. Merlin, was living was he not?

THE WITNESS: Oh, no.

THE COURT: Oh — when Mr. McConnell came Mr. Merlin was already dead?

THE WITNESS: Oh, he had been dead quite a few years and I was just a small child.

THE COURT: And then your mother married Mr. McConnell?

THE WITNESS: Yes.

* * *

BY MR. FORESTER:

Q. How old was the decedent, Edward McConnell, [9] when your mother married Arthur McConnell? A. Oh — he was eighteen months because they adopted him right after they were married.

Q. Well Mrs. Prather, do you know which took place first — do you know whether your mother married Arthur McConnell before Eddy McConnell came to live with you or after your mother brought Eddy McConnell to live with you and then married Arthur McConnell? A. They married first and then they brought Edward.

Q. And this was at a time when he was about eighteen months old? A. Yes.

Q. Did there come a time Mrs. Prather, when Eddy commenced his education and started going to school? A. Yes — he went to school.

Q. And do you recall which school that was? A. It was No. 2 they called it and then in later years they called it Eliza Jane Wilson.

Q. And where was that located? A. That was Pensacola, up on Gregory Street. I went there myself and he went.

[10] Q. Incidentally, from the time he came to live with you and until the time he left home did you maintain the family home in Pensacola? A. Yes.

Q. And did your family belong to any church? A. Yes — we were Catholic and of course he was Catholic.

Q. And what church was that? A. St. Michael's in Pensacola.

Q. Do you recall Mrs. Prather when Eddy McConnell — if he was — when he was baptised? A. No.

Q. You don't recall? A. I can't recall that.

Q. And what —

THE COURT: Just a minute, please. What denomination is that church — St. Michael's in Pensacola — is it Methodist, of Catholic or what?

THE WITNESS: Catholic — Catholic.

BY MR. FORESTER:

Q. And the family did belong to the Catholic Faith? A. Yes.

[11] Q. And you testified that Eddy was brought up in the Catholic Faith? A. He was brought up in the Catholic Faith.

Q. Now Mrs. Prather, did there come a time when Eddy was older and that he wanted to go to work? A. Yes — he was going to school.

Q. Do you remember what he did then? A. And then he decided he wanted to get a job.

THE COURT: He wanted to get a job?

THE WITNESS: Yes and so Mama tried to insist on him to stay in school and finish it, at least finish high school and he kept insisting that he wanted to work, so she told him – "Well, if you do, I will let you go to work if you go to night school" and he said "Yes." so he got him a job, then, in the Western Union.

BY MR. FORESTER:

Q. And you say he was how old at that time, or do you recall that? A. He was sixteen.

Q. While he was working and going to school during this period, do you know what he did with the money that he earned? [12] A. Well when he worked at the Western Union he brought his money home to Mama.

Q. Mrs. Prather – during this period of time you say he lived with you, how was he treated in your home? A. Well, he was treated just like one of the rest of the family.

Q. Did there come a time after that Mrs. Prather when Eddy started fighting professionally? A. Oh, yes.

Q. Tell us about that? A. Well he was working at the Western Union and we used to see a piece in the paper of the name of a boy by the name of Eddy Berle and we didn't pay any attention – my mother and I didn't pay any attention – but my husband, he noticed it, and he said "I think that is Eddy" so sure enough, we looked into it and we found out it was him.

Q. Now this name of Eddy Berle – do you of your own knowledge know where that name came from? A. I think his manager – in fact I know his manager, Potts, gave him the name. He was fighting under that name.

Q. Mrs. Prather, did this name Berle have any significance in the family? [13] A. No – no.

Q. I see.

THE COURT: How – if you know – how long did he fight?

THE WITNESS: Oh — he fought until he was, he must have been — let's see — thirty five years old.

BY MR. FORESTER:

Q. During this period, Mrs. Prather, after he was sixteen you testified he began fighting — how long did he remain within the family under your mother's and father's control — until what age?

A. Well, when he started fighting, of course, he had to go out of town and he went to — he say he went to stay with Potts for a while and then he would come home occasionally.

Q. And where did this man Potts live? A. He lived in Mobile — at one time Edward was fighting in Mobile and he sent money for Mama to come there and be with him, you know, so she did — she went over and stayed a couple of weeks with him. Then she was — while she was there, she fell and broke her collarbone.

Q. Mrs. Prather, do you recall anything of [14] significance which occurred at the time that Eddy was twenty one years old?

A. Oh, yes, sir. We were living at Miami then and he came down the driveway and he was happy and smoking a big cigar — which he never did smoke and drink or anything — so he came up and he told Mama, he said: "You can't do anything with me; you can't tell me now," he said, "I am twenty one years old today," and he said, "I can smoke now", but he just did that to kind of, to joke with her because he threw it away, just to prove that he was a man that day.

Q. Mrs. Prather, going on into later years now, the nineteen thirties and the nineteen forties, during that period of time did you maintain your contact with Eddy as an adult? A. Oh yes — we always — he would come back to visit us, and when he would come back to visit us he would have a fight and he would always insist on us having some of his money

THE COURT: Is your mother living now or dead?

THE WITNESS: My mother is dead now.

THE COURT: When did she die?

THE WITNESS: She died in 1946.

[15] BY MR. FORESTER:

Q. Would you tell us what occurred at the time or just prior to the time of your mother's death? A. About five months before she died she fell — in fact she went to get up from the bed one morning and she just fell — and she broke her hip. In fact it just gave way, and she begged not to go to the hospital so we get the doctor and he put her into the bed with sandbags and all and then we kind of lost Edward for a period of time and we didn't — we couldn't find him and she kept asking for him and asking for him and lay in the bed five months and died without seeing him.

Q. By the way Mrs. Prather — do you know when your mother was born? A. She was born in April — April 10th 1965.

Q. Wait a minute now— A. Eighteen sixty five, I am sorry.

Q. Now did there come a time after that Mrs. Prather, after your mother was gone, that you re-established contact with the deceased, Edward McConnell? A. Yes. I have a cousin that came to Washington and I had some relatives that lived here and she visited them and while she was here Edward was there at this home.

[16] Q. So as a result of that you re-established contact with Eddy? A. That's right.

Q. When was this, do you recall? A. Not exactly. I know it was maybe a year after Mama's death.

* * *

Q. So during those later years, 1947 and so on — or during the later years, did you see much of Eddy? A. Well we — after we made contact with him in Washington, we went to see him in Washington and he came to visit us in Miami.

Q. How often did these visits occur? A. Well he sometimes — he would come and spend his vacation with us, which was two weeks.

Q. And how often would you see him Mrs. Prather? A. Well – well maybe once or maybe twice a year.

Q. Mrs. Prather, can you identify this group of photographs?

A. Yes – that is Edward.

[17] Q. Thank you.

MR. FORESTER: I would like to have these marked, Your Honor. There are four.

THE COURT: Very well.

MR. BROWNING: No objection.

MR. FORESTER: If there is no objection I would offer them in evidence.

MR. BROWNING: No – let her identify them.

MR. FORESTER: She did. I will go into more detail.

MR. BROWNING: All right.

THE COURT: They may be admitted.

(Whereupon a group of photographs having been previously duly marked as Exhibits 1, 2, 3 and 4 were admitted into evidence.) (Defendant's).

BY MR. FORESTER:

Q. Mrs. Prather, I show you defendant's exhibit 1 – can you tell us what that is? A. That is a picture of Eddy.

Q. And where did you get that picture? A. He sent it to us.

Q. Is there a description on the picture? A. Yes "Again I wish you, Steen and the children best of love – as always, Eddy". I am Steen.

[17] Q. Who is Steen? A. I am Steen.

Q. Is that a nickname? A. Nickname.

Q. And that is a picture of him in his fighting clothes? A. Yes.

Q. All right – I show you exhibit 2 – could you describe what that is? A. Well that is Eddy and my son and my two daughters.

Q. Where was this picture taken? A. Taken in Miami.

Q. On the beach? A. On Miami Beach.

Q. And now Number 3 – who is that a picture of? A. That is Eddy again with the same children, Jack my son and two girls, Ruth and Betty.

Q. And No. 4? A. That is Eddy and Jack.

Q. And again taken – A. At Miami Beach.

Q. Mrs. Prather, were these taken during visits of [18] Eddy?

A. Yes.

* * *

CROSS EXAMINATION

BY MR. BROWNING:

Q. Mrs. Prather – what relation is Nina Jackson Miller to you?

A. My sister.

Q. Your whole sister? A. No – she is my half sister.

Q. Oh – well now – your father was Joseph Merlin? A. Yes.

Q. And you were, I take it, a child of your mother's second marriage, is that right? A. I was – yes.

Q. Well what was your sister's father's name? A. Miller. I have it backwards. My sister is Miller Jackson.

Q. Oh. Do you remember Nina Miller Jackson? A. Oh, yes.

Q. And Jackson is her married name? [19] A. Yes.

Q. And Miller was her maiden name? A. Yes.

Q. I see. Well then McConnell – Arthur McConnell – was your mother's third husband, is that correct? A. Yes.

Q. So that each of you two ladies, that is to say you and your half-sister, if Edward had actually been a child of the McConnells – were half sisters of Eddy, is that correct? Do you understand me?

A. Yes – I guess so.

Q. The accused (sic)? A. Half-sisters.

MR. BROWNING: Yes – I have no further questions.

REDIRECT EXAMINATION

BY MR. FORESTER:

Q. Just one question Mrs. Prather – what is your age?

A. Sixty nine.

THE COURT: How old?

THE WITNESS: Sixty-nine.

THE COURT: Do you remember when Eddy was baptised?

[20] THE WITNESS: No, ma'am – I don't. I do not. That is one thing I can't of myself think of. My mother would do things, you know – and she just probably took him down to the church and had him baptised.

RECROSS EXAMINATION

BY MR. BROWNING:

Q. Could you fix the year that Eddy came to live at your house? A. It must have been around 1918 or something; around then.

Q. Well I don't like to ask a lady her age but you testified that you were sixty nine – what was your birth year? A. Eighteen ninety seven.

Q. How old were you when Eddy came to live with you? A. About nine I guess – nine.

Q. And that would make him arrive in 1906 would it not?

A. Well – maybe I am two years behind.

THE COURT: I don't think she has ever given a year. She said that he came to live with her family but not the year. She has only given her age and his age when he came there.

[21] MR. BROWNING: Well I wanted to get a birth date if I could Your Honor.

BY MR. BROWNING:

Q. Then you can't fix the year exactly – or could you? A. No – it was nineteen-o-six or nineteen-o-eight or something like that. It was along in there.

THE COURT: Your half-sister is older than you are — is she not?

THE WITNESS: Yes.

THE COURT: What is her age?

THE WITNESS: Yes — I am sixty nine — I think she is four years older than I am.

* * *

MR. FORESTER: If Your Honor please I would like Mr. John Norton to take the stand.

Whereupon

JOHN NORTON

was called as a witness and, having been first duly sworn, was examined by counsel and testified as follows:

DIRECT EXAMINATION

BY MR. FORESTER:

[22] Q. Would you give us your full name and address please?

A. My name is John T. Norton — 2555 Third St. North, Arlington, Virginia.

Q. Mr. Norton — what is your business or profession? A. I am a special agent of the World Insurance Company.

Q. Mr. Norton — did you know the deceased, Edward Rumont McConnell? A. Very well — for about eighteen years.

Q. Well, did there come a time in this eighteen year period, that you saw the deceased Edward McConnell in your capacity as an insurance agent? A. Yes — he spoke to me about buying some accident and insurance for hospitalization and sickness.

Q. And did you in fact sell him some insurance policies? A. Yes.

Q. Now Mr. Noton — I show you these two cards — could you identify these? A. Yes, sir.

MR. FORESTER: May these be marked as exhibit 5 and 6 – this one first?

[23] (Whereupon a card was marked for identification as defendants' exhibit 5.)

BY MR. FORESTER:

Q. Mr. Norton – where did that defendant's exhibit 5 come from? A. From our office – it is a master card.

Q. Is that card maintained as a business record in the normal course of business in your office? A. Yes, sir.

MR. FORESTER: Your Honor – I ask that this be received into evidence as Exhibit 5.

THE COURT: Do you have any objection;

MR. BROWNING: No.

(Whereupon Defendant's Exhibit 5 was received.)

BY MR. FORESTER:

Q. Mr. Norton, can you tell us what that card shows? A. It gives the name of the insured – and the occupation – beneficiary.

Q. Yes? A. Kind of policy – present age and date of birth and rating of the insured – code numbers, riders if any upon the policy.

[24] Q. What name of what insured appears on that policy? A. Edward R. McConnell.

Q. Does that card - for what kind of policy is that? A. That is for an accident and sickness policy in the amount of two hundred dollars monthly income, with a twenty five hundred dollars principal sum.

Q. Does that card show who the beneficiary under the policy in the event of accidental death is? A. The beneficiary – Ernestine Prather.

Q. And what is the relationship? A. Sister.

Q. Mr. Norton, could you identify this? A. Yes, sir.

MR. FORESTER: May this be marked for identification Your Honor?

THE COURT: Yes.

(Whereupon policy referred to was marked as Defendant's exhibit No. 6 for identification.)

BY MR. FORESTER:

Q. What does this purport to be, Mr. Norton? A. This is a compensation, accident-sickness policy.

[25] Q. Is that the same policy which is referred to on this card which is defendant's exhibit No. 5? A. Yes, sir.

MR. FORESTER: Your Honor may this be received into evidence?

MR. BROWNING: We have seen it — no objection.

THE COURT: Very well.

(Whereupon Defendant's exhibit 6 for identification was received into evidence.)

BY MR. FORESTER:

Q. Turning to the inside of it Mr. Norton — this purports to be an application for insurance? A. Yes, sir.

Q. And can you tell us whose handwriting that is? A. That is in mine.

Q. Did you sign that document? A. As a witness — yes.

Q. And who signed it as principal? A. Edward R. McConnell.

Q. That is the deceased? A. The deceased.

Q. Does that application indicate on there who the beneficiary is to be? [26] A. Yes, sir.

Q. Would you tell us who that is? A. Ernestine Prather — sister.

Q. And the "sister" is filled in the blank for "relationship" is that correct? A. Yes, sir.

Q. When was this application made? A. Eighth day of December 1960.

Q. Mr. Norton, you testified that you knew the deceased some eighteen years. And that you wrote insurance and that you filled out this application in your handwriting — at any time during those eighteen years and during this business relationship and these interviews and the taking of this application, did you have any knowledge as to the actual relationship between the deceased, Edward R. McConnell and the beneficiary named here as his sister, Ernestine Prather? A. Only as given on the application as his sister.

Q. Did you have any knowledge as to whether she was or was not actually a blood sister of Edward R. McConnell? A. Not until after his death.

Q. Mr. Norton, did there come a time when you met a son of Mrs. Prather — Mr. Jack Prather? A. If that is the gentleman in the courtroom —?

[27] Q. Yes. A. Yes, sir.

Q. Do you recall when this was? A. Yes, sir.

Q. When was it? A. Well — I can't give you the exact date, but —

Q. Well as near as you can recall. A. Well it was in the D.C. General Hospital.

Q. I see. A. And it was I believe in February.

Q. Of what year? A. That would be Nineteen sixty five.

Q. And who introduced you to Mr. Prather? A. Eddy.

Q. Can you recall who he introduced you at that time? A. He introduced him as his nephew. I mean he introduced him to me as his nephew.

* * *

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from the original bound volume

PLAINTIFF'S EXHIBIT 7

Certificate of Baptism



St. Michael's Church
Pensacola, Florida

This is to Certify

That Edward Raymond Mc Connell
Child of Arthur ^{deceased} Mc Connell
and Minnie Mc Connell
Born in Pensacola, Florida
on the 19th day of December 1908

was **Baptized**

on the 30th day of November 1913

According to the Rite of the Roman Catholic Church

By the Rev. R. Fullerton

the Sponsors being { Frank Brown
Edna Garvey

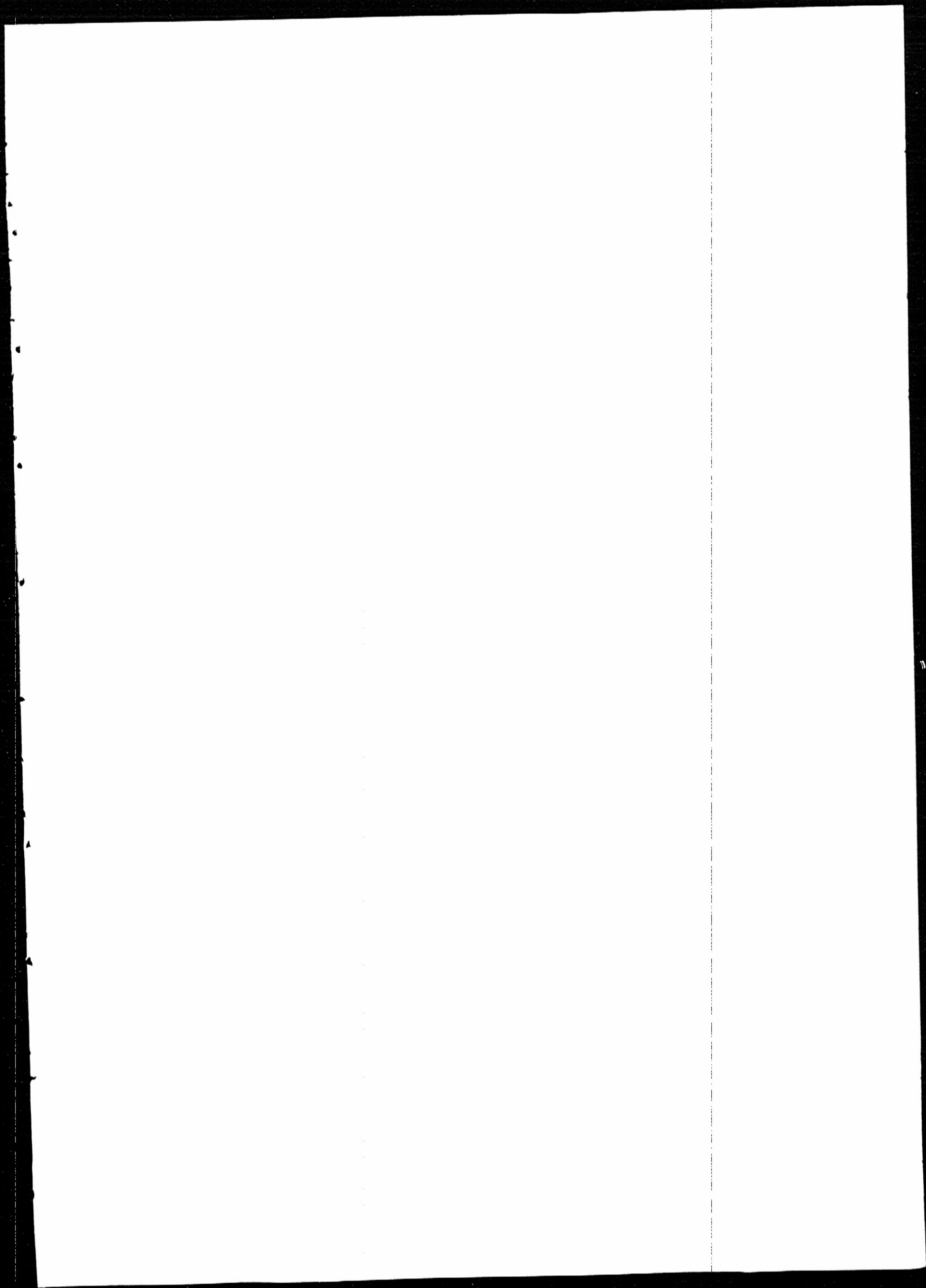
as appears from the Baptismal Register of this Church

Issued October 28, 1965

Rt. Rev. William J. Cusick
Pastor

BEST COPY AVAILABLE

from the original bound volume



BRIEF FOR APPELLEE

**UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit**

No. 21,216

ERNESTINE PRATHER, et al.,**Appellants,****v.****DISTRICT OF COLUMBIA,****Appellee.**United States Court of Appeals
for the District of Columbia Circuit**FILED** NOV 9 1967*Nathan J. Paulson*
CLERK

**Appeal From The United States District Court
For The District Of Columbia**

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Assistant Corporation
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Washington, D. C. 20004**

STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellee, the questions presented are:

1. In the absence of a legal adoption of the decedent by his foster parents, does the doctrine of equitable adoption entitle the natural children of the decedent's foster parent to inherit from the decedent?
2. Does the evidence establish an equitable adoption of the decedent by his foster parents?

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,216

ERNESTINE PRATHER, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 9 1967

Nathan J. Paulson
CLERK

Appeal From The United States District Court
For The District Of Columbia

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for Appellee were mailed, postage prepaid, this 9th day of November 1967, to Walter E. Gilchrist, Esq., 1317 F Street, Northwest, Washington, D. C. 20005, Attorney for Appellants.

David P. Sutton
DAVID P. SUTTON,
Assistant Corporation Counsel, D. C.

STATE OF NEW YORK

County of _____

IN SENATE

January 1, 1900

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE

FOR THE YEAR 1899

ALBANY: JAMES B. LEECH, PRINTERS.

1899

ALBANY: JAMES B. LEECH, PRINTERS.

ALBANY: JAMES B. LEECH, PRINTERS.

ALBANY: JAMES B. LEECH, PRINTERS.

DAVID H. LUTHER, JR.

ALBANY: JAMES B. LEECH, PRINTERS.

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Southwestern Law Journal, Volume 18, <u>Adoption by Estoppel-- Inheritance From the Adopted Person</u> , pages 146, 149, <u>et seq.</u>	13
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* Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,216

ERNESTINE PRATHER, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In an administration proceeding in the court below, appellee interposed an objection to the first and final account of the administration of the estate of Edward R. McConnell, who died intestate. The basis of appellee's objection is that appellants, to whom the administrator proposed to distribute the decedent's estate, were not heirs at law and that his estate had escheated to the District of Columbia (J. A. 6). In asserting that they were entitled to inherit his estate, appellants claimed that they were the decedent's half-sisters by equitable adoption (J. A. 1, 2, 8).

The decedent was born in Pensacola, Florida, on December 19, 1908. When he was eighteen months old, he was taken into the home of appellants' mother and step father, Mamie and Arthur McConnell, under undisclosed circumstances (J. A. 7, 15, 30.) The McConnells reared and educated the decedent and he was known by their family name (J. A. 8, 16-19). When the decedent was almost five years old, he was baptized in St. Michael's Catholic Church in Pensacola. On a copy of the baptismal certificate introduced into evidence in the court below, decedent is listed as the adopted child of the McConnells (J. A. 7, 18, 30.)

The decedent left home when he was 16 years old, but he thereafter visited with the McConnells on occasions (J. A. 19-21). In 1960, when the decedent applied for an insurance policy, he listed appellant Ernestine Prather as the beneficiary, describing her as his sister (J. A. 8, 26, 27, 29).

The decedent was never legally adopted by the McConnells, who predeceased him, and the record does not show that the McConnells at any time entered into a contract or agreement to adopt him. Nor does the record disclose that the McConnells at any time entered into an arrangement or understanding respecting the decedent's care and support. (J. A. 8.)

In ruling in appellee's behalf, the court below stated in a written opinion that:

" * * * Had Edward R. McConnell, the decedent here, survived his foster parents and proved an adoption contract between his natural mother and his adoptive parents (Arthur and Mamie McConnell), he could have successfully claimed a portion of any intestate estate left by such adoptive parent or parents, even though formal adoption was never consummated." (J. A. 8-9.)

The court concluded, however, that a contract or agreement to adopt, even if proven, cannot create or give rise to a status of legal adoption, but creates, at most, an equitable adoption which is designed to benefit the child and which cannot inure to the benefit of the relatives of the foster parents and that, accordingly, appellants were not entitled to inherit the decedent's estate (J. A. 8-13).

This appeal followed (J. A. 14).

SUMMARY OF ARGUMENT

The doctrine of equitable adoption does not confer upon the asserted adoptee the status of an heir, but is designed to protect such asserted adoptee by permitting him to share in the estate of foster parents who fail to perform their agreement to adopt. As such, the doctrine cannot inure to the benefit of appellants as the natural

children of a foster parent of the decedent. The expansion of the doctrine to accomplish such a far-reaching result would run counter to policy considerations declared by a unanimity of precedent.

The record discloses not one particle of evidence respecting a contract, agreement, or even an understanding entered into by the foster parents of the decedent whereby the decedent was to be adopted by the foster parents. The evidence as to the relationship of the foster parents to the decedent is not unequivocally referable to a contract of adoption since it can be just as easily harmonized with a desire to rear, educate, and perform acts of human kindness for a child as with a contract to adopt him. There is, accordingly, no showing of an equitable adoption of the decedent by his foster parents.

ARGUMENT

I

The doctrine of equitable adoption does not entitle appellants to inherit the decedent's estate.

Appellants, as the natural children of the late Mamie McConnell, sought in the court below to inherit the estate of the late Edward R. McConnell on the theory that he was their half-brother by equitable adoption. Although Edward resided with appellants in the household of

their mother and step father, Mamie McConnell and Arthur McConnell, and was referred to by appellants as their brother during his lifetime, it is undisputed that he was not the natural child of the McConnells. It is likewise undisputed that Edward was not their legally adopted child, no steps ever having been taken to institute adoption proceedings. In a written opinion (268 F. Supp. 346), the court below noted that if Edward R. McConnell had survived his foster parents and had proven an adoption contract,¹ he could have successfully made claim against the estate of his foster parents under the doctrine of equitable adoption. But in ruling in appellee's behalf, the court concluded that the doctrine of equitable adoption is without application where, as here, a claim is made, not by the equitable adoptee against the estate of his foster parents, but against the equitable adoptee's estate by one bearing no legal relationship to him. In so ruling the court acted correctly, for an analysis of the doctrine of equitable adoption will demonstrate beyond peradventure that it may not be utilized to produce the far-reaching result which appellants now urge upon this Court.

¹ Appellee by no means concedes that the existence of an adoption contract was established by the evidence. See Argument II, infra.

The doctrine of equitable adoption does not create the legal status of parent and child or constitute one an heir, as does a legal adoption. In re Jarboe's Estate, 235 F. Supp. 505 (D. C. D. C., 1964); Besche v. Murphy, 190 Md. 539, 59 A. 2d 499 (1948); Stith v. Willis, 219 Ga. 62, 131 S. E. 2d 620 (1963); Caulfield v. Noonan, 229 Iowa 955, 295 N. W. 466 (1940); 2 CJS Adoption of Children, § 27, p. 401. The rights of the equitably adopted child do not derive from statute, but from an agreement to adopt. Upon the death of the foster parents, the child may enforce such an agreement against their estate in equity. In enforcing the agreement, some courts employ a specific performance theory whereby the administrator of the estate of the adoptive parents may be compelled to distribute to the equitably adopted child an amount measured by that to which he would have been entitled had he been legally adopted. In so doing, the courts apply the maxim: equity regards as done that which ought to be done. See In re Garcia's Estate, 45 N. M. 8, 107 P. 2d 866 (1940); Besche v. Murphy, supra; 40 North Dakota Law Review, Equitable Adoption and the Contract to Adopt, p. 184, et seq. Other courts choose to base their decisions on an estoppel theory, whereby a child who has changed his position to his detriment in reliance on the representations of the foster parents is entitled to be treated as though legally adopted for purposes of

sharing in their estate. See Heien v. Crabtree, 369 S. W. 2d 28 (Tex. Sup. Ct., 1963); 15 Baylor Law Review, Comment: Adoption by Estoppel: History and Effect, p. 162, et seq.

The doctrine of equitable adoption, therefore, is designed to benefit the child. It is not designed to inure to the benefit of the foster parents or their heirs by permitting them to inherit the estate of the child, for to countenance such a result would, in effect, permit the foster parents to profit by their own neglect in failing to adopt the child in accordance with the contract of adoption. The basic flaw in appellants' argument is that they overlook this important principle.

It should be emphasized that, were the fact situation reversed so that an alleged equitably adopted child was claiming entitlement to inherit from the natural children or collateral heirs of those allegedly adopting him, such a claim, by an impressive and consistent array of precedent, would be abortive.

In Caulfield v. Noonan, 229 Iowa 955, 295 N. W. 466 (1940), the appellant claimed that, pursuant to an agreement to adopt, he was the equitably adopted son of parents who predeceased him. As such, he claimed that he was entitled to share in the estate of Edward Caulfield, a deceased natural child of such parents. Emphasizing that the doctrine of equitable adoption cannot cure the failure to effect a legal

adoption so as to make one an heir, and refusing to apply the doctrine to permit one not in privity with the decedent to share in his estate, the Court said (295 N. W. at 471):

" * * * [W]e have always taken the same attitude toward the matter, and that is that neither by contract nor estoppel can the child become legally adopted. * * *

"While the defendants, Rose and Matilda, might be barred by the contract or estoppel of their parents from disputing the right of appellant in the estates of the latter, a question which is not before us and which we do not decide, there is nothing in this record to sustain a holding that they are barred by contract or estoppel from disputing the appellant's claim to a share in the estate of Edward."

In In re Olson's Estate, 244 Minn. 449, 70 N. W. 2d 107 (1955), a person alleging that he had been equitably adopted made claim against the estate of the brother of one of his foster parents. Distinguishing this factual situation from one in which the equitably adopted child claims an interest in the estate of the foster parent, the Court said (70 N. W. 2d at 110):

"If the fact situation here were to same as in the Firlie case, we would have no difficulty following the holding in that case. However, we have a different situation here. Johnny O. Olson is not attempting to recover as an adopted son from the estate of his foster parents; he is seeking to recover

from the estate of Gilbert K. Olson as the latter's adoptive nephew."

To the same effect are Menees v. Cowgill, 359 Mo. 697, 223 S. W. 2d 412 (1949); Asbeck v. Asbeck, 369 S. W. 2d 915 (Tex. Sup. Ct., 1963). These cases are sufficiently analogous to be worthy of consideration here. But there are other cases even more directly in point.

In Heien v. Crabtree, 369 S. W. 2d 28 (Tex. Sup. Ct., 1963), Frank and Rosa Frei, husband and wife, took an illegitimate child into their home under an agreement to adopt, treating the child as their own until he was twenty-two years of age. As here, the child thereafter died unmarried and intestate, the adoptive parents having predeceased him. As here, the estate was claimed by the heirs of the adoptive parents under the doctrine of equitable adoption. Concluding that the doctrine was completely inapplicable to such a factual situation, the Court said (369 S. W. 2d at 30):

" * * * [P]etitioners contend that the doctrine of estoppel in pais should be applied both ways; that inasmuch as they would be estopped to assert that R. F. Frei was not an adopted child if he had survived Frank and Rosa and had sought to establish a right of inheritance to their estates, the administrator of his estate should be estopped to assert that he was not an adopted child when they, as heirs of Frank and Rosa, seek to

establish a right of inheritance to his estate. They assert that on this theory they have alleged a right of succession. How can that be? Petitioners' rights can be no better or higher than the rights of those through whom they claim. If Frank and Rosa had survived R. F. and were seeking to establish a right of succession to his estate, they would not be heard to claim the aid of equity. Through neglect or design they breached their agreement to adopt. More than that, there would be no basis in promises, acts or conduct on the part of R. F. upon which to erect an estoppel. Neither he nor his mother breached a duty to Frank and Rosa or in any way misled them to their detriment."

Rumans v. Lighthizer, 363 Mo. 125, 249 S. W. 2d 397 (1952), also involved a factual situation similar to that here presented. There, as here, a claim was made against the estate of a decedent alleged to have been equitably adopted by foster parents who had predeceased him. There, as here, the persons making the claim were blood relatives of the foster parents. Rejecting the contention that the doctrine of equitable adoption justified inheritance of the alleged adoptee's estate by the natural heirs of the foster parents, the Court said (249 S. W. 2d at 401):

"An equitable adoption functions to enforce the rights of the child under the agreement to adopt. The child is not chargeable with the adoptive parent's failure to record the deed, and the enforcement in equity of the agreement to adopt should not confer additional rights upon the adoptive parent. The right of inheritance from the child is a

different right from that of the child to enforce the agreement to adopt. * * * [A] legal or statutory adoption, binding on all persons in accord with the statutory provisions, differs from an equitable adoption, which is based upon contract for the protection of the child and binding on the parties or those in privity with them. * * *
[Emphasis added.]

Locally, in In re Jarboe's Estate, supra, a granddaughter of the foster parents claimed a share in the estate of the alleged adoptee by equitable adoption. But the court refused to expand the doctrine of equitable adoption to accomplish such a far-reaching result. Stressing that an equitable adoption does not create the legal status of parent and child and is not equivalent to a legal adoption, Judge Tamm, now of this Court, said (235 F. Supp. at 508, 509):

" * * * Assuming for the purpose of this motion that the facts of a contract to adopt the decedent is established, it is the holding of the Court that under the law of Maryland an 'equitable adoption' does not give the child the status of being legally adopted, and hence the heirs of the child's foster parents have no claim against his estate should the child die intestate. * * *

* * * * *

" * * * Moreover, petitioner cites, and the Court has found, no case which has specifically held that the concept of 'equitable adoption' is the equivalent of legal statutory adoption for the purpose of allowing the fos-

ter parents or their heirs to inherit from
the estate of the foster child." [Emphasis
added.]

In the instant case, there admittedly was no legal adoption. Nor do we have a situation in which the doctrine of equitable adoption is utilized as a basis for making claim against either a foster parent or his estate. Significantly, appellants cite no precedent in which the doctrine of equitable adoption has been extended to accomplish a result such as that here sought. Appellee is aware of no such precedent.

Apart from the many cases which militate against the position of appellants, the holding which they now request would amount to a judicial articulation of inheritance policies, the creation of which has traditionally fallen within the prerogative of the legislature. Such a holding, for example, would justify inheritance by the foster parents from the child after they have breached their contract to legally adopt the child, even in cases where the child's natural kin survive him. It would likewise justify inheritance by the child from descendants and collateral heirs of the foster parents, notwithstanding the complete absence of privity of estate between them and the asserted adoptee. The holding which appellants request would have the effect of equating an equitable adoption with a legal adoption in complete disregard of the salutary proposition that a legal adoption can take place only when there has been

compliance with statutory formalities. In short, appellants would have this Court create a method whereby the statutory policy regarding adoption may be readily and easily circumvented (Sections 16-301 through 16-315, D. C. Code, 1967). It is submitted that the Court should decline to do so. Appellee does not dispute the notion that the absence of a legal adoption may in certain cases result in a distribution of a decedent's estate contrary to his presumed wishes. The alleviation of such a result, if desirable, must, however, be by the legislature, not by the judiciary. Cf. Heien v. Crabtree, *supra*, dissenting opinion; 18 Southwestern L. J. 146, 149, *et seq.*, Adoption by Estoppel-Inheritance From the Adopted Person.

II

In any event, an equitable adoption of the decedent by his foster parents was not established by the evidence.

Appellants failed to establish in the court below the existence of a contract or agreement by the decedent's foster parents to adopt him. Such failure is fatal to appellants' claimed right to inherit from the decedent. Where, as here, one seeks to establish that an oral contract of adoption was entered into, the standards of proof which must be met are understandably exacting. In re Berge's Estate, 234 Minn. 31, 47

N. W. 2d 428 (1951); Clemons v. Clemons, 193 Okl. 412, 145 P. 2d 928 (1943); Westlake v. Westlake, 201 S. W. 2d 964 (Mo. Sup. Ct., 1947); Burdick v. Grimshaw, 113 N. J. Eq. 591, 168 Atl. 186 (1933), Johnston v. Eriksson, 71 S. D. 268, 23 N. W. 2d 799 (1946); House v. House, 222 S. W. 2d 337 (Tex. Civ. App., 1949).

In Burdick v. Grimshaw, supra, the Court said (168 Atl. at 189):

" * * * parol agreements of that character are not looked upon with favor by the courts. * * * Such is but the natural result of the fact that they are easily fabricated and most difficult to disprove, since they most usually are not brought into controversy until after the grim reaper has intervened and forever hushed the voice of the alleged promisor. Moreover, they afford unlimited opportunity, with but little danger of detection, to unscrupulous persons, intent upon the pillage and spoilation of decedent's estates, for the perpetration of fraud and the wrongful diversion of a decedent's property from those to whom it otherwise naturally would have passed. It is because of these facts that the courts have come to regard this class of oral agreements with grave suspicion, have subjected them to close scrutiny, and have allowed them to stand only when established by evidence that is clear, cogent, and convincing, leaving no doubt with respect to their actual making and existence." [Citations omitted.]

Persuasive policy considerations underlie this rule. In

Benjamin v. Cronan, 93 S. W. 2d 975, 981 (Mo. Sup. Ct., 1936), the Court said:

" * * * If this rule is relaxed, then couples, childless or not, will be reluctant to take into their homes orphan children, and for the welfare of such children, as well as for other reasons, the rule should be kept and observed. * * * "

The evidence required to establish a contract of adoption must not only be consistent with the existence of such a contract, but must be such that it cannot be squared with any other rational theory.

Crilly v. Morris, 70 S. D. 584, 19 N. W. 2d 836 (1945); In re Cheaney's Estate, 266 Wis. 620, 64 N. W. 2d 408 (1954); Hutton v. Busaytis, 326 Ill. 453, 158 N. E. 156 (1927). In the application of this principle, it must be borne in mind that it is not illogical for a couple to take a foster child into their home, treat the child as their own, refer to him as their "adopted child" in the community, even intend to adopt him in the future, but still not enter into a contract for his adoption. Epstein v. Mesher, 118 U. S. App. D. C. 142, 333 F. 2d 152 (1964); In re Cheaney's Estate, supra; Benjamin v. Cronan, supra, Clemons v. Clemons, supra. Indeed, the cases disclose a definite distinction between an intention to adopt on the one hand and an agreement to adopt on the other. Without the latter there can be no equitable adoption. Hutton v. Busaytis, supra; In re Rowe's Estate, 269 Minn. 557, 132 N. W. 2d 180 (1964).

In Epstein v. Mesher, supra, the record discloses that the foster parents listed the asserted adoptee as their daughter in the school records of the District of Columbia and in the census records. They also referred to her as their daughter in local newspapers when they announced her engagement to marry, and subsequently arranged and paid for her wedding. Notwithstanding these circumstances, this Court rejected the notion that an agreement to adopt had been entered into.

The Court said:

"We need not and do not decide whether the statutory method of adoption is exclusive, or whether the doctrine of equitable adoption also prevails in the District of Columbia, because under either, Mrs. Epstein must fail: there was no promise or contract to adopt which would support her equitable adoption theory and, admittedly, there was no statutory adoption. * * * "

[Emphasis added.]

In Bank of Maryville v. Topping, 216 Tenn. 597, 393 S. W. 2d 280 (1965), the alleged adoptee was taken into the home of foster parents shortly after birth. As here, he was baptized in the name of the foster parents and thereafter reared in their home. He always considered them to be his parents and they at all times held him out to the public as their son and considered his children their grandchildren. Rejecting the contention that all this established a contract to adopt, the Court said (393 S. W. 2d at 284):

"In the case before us, there was no attempt to comply with the adoption statutes, nor was there any evidence of a contract to inherit or to adopt. It is our opinion that the action of the Millers for so many years would not constitute evidence of a contract, either expressed or implied. It is proper for this Court to interpret and construe contracts made by parties, but it is improper for us to, in essence, draft a contract for the parties when, in fact, there is no evidence of a contract." [Citations omitted.]

In In re Cheaney's Estate, supra, the alleged adoptee was known in the community by the name of the foster parents, referred to by their name in the family Bible, as well as in census reports. During his adult life, he made many visits to the home of his foster parents, and there was evidence of a professed intention to legally adopt him. Concluding that a contract of adoption had not been established, the Court said (64 N. W. 2d at 411):

"The circumstances and the statements made by Mrs. Cheaney are consistent with the theory of adoption, but they are not evidence of a contract to make Henry an heir or to adopt him. If there were any evidence of a legal contract to adopt him the testimony might be of some value in proof of an agreement, but without any showing whatever that the Cheaneys had done more than to take him into their home and there treat him as they might a son, the testimony does not establish a contract to adopt him. There is an absolute absence of any evidence from which it might be inferred

that either Mr. or Mrs Cheaney ever
agreed to adopt the boy. * * * "

In In re Rowe's Estate, 269 Minn. 557, 132 N. W. 2d 180 (1964), the alleged adoptee was baptized in the name of the foster parents, consistently referred to as their child in school records throughout her youth, described as their daughter in wedding announcements and always held out in the community by the foster parents as their daughter. In addition, the child's foster father had stated on several occasions that he had always intended to adopt the child. Noting that the acts of foster parents in taking into their home and caring for a child as they would have cared for their own child could not be equated with an equitable adoption (132 N. W. 2d at 182), the Court refused to conclude that a contract could be implied from the evidence at hand. In so doing, the Court distinguished several cases in which the evidence disclosed that a specific contract of adoption had been entered into (132 N. W. 2d at 183).

Appellants cite two Florida cases which deal with the doctrine of equitable adoption, namely Sheffield v. Barry, 153 Fla. 144, 14 So. 2d 417 (1943) and Roberts v. Caughell, 65 So. 2d 547 (Fla. Sup. Ct., 1953). But these cases only serve to further support the position of appellee. In both Sheffield and Roberts, the evidence disclosed the existence of an agreement between the child's natural parents and his

foster parents whereby the latter specifically promised to adopt the child. The record in the instant case is completely silent as to the circumstances under which decedent entered the home of his foster parents. Not one particle of evidence was adduced below to show a contract or agreement to adopt him,² or, for that matter, even an understanding or arrangement entered into by the decedent's foster parents respecting his care and support. It is true that he was baptized in the name of his foster parents, treated as their own child, and held out in the community as such. But these circumstances may be just as easily harmonized with acts of kindness in undertaking to rear and educate a helpless child as with an actual agreement to adopt the child. In short, tested by evidentiary standards traditionally upheld by the Courts, appellants utterly failed to establish a relationship between the decedent and his foster parents which is unequivocally referable to a contract of adoption. In the absence of such a contract, there was no equitable adoption.

² The decedent's unilateral act of referring to one of the appellants as his sister in an application for insurance falls far short of establishing that an agreement to adopt him was entered into many years previously between his natural mother and his foster parents. Compare Lamb v. Feehan, 276 S. W. 71 (Mo. Sup. Ct., 1925).

CONCLUSION

Upon the foregoing, it is respectfully submitted that the doctrine of equitable adoption, upon which appellants rely, has no application to the facts of this case. Further, assuming, arguendo, the applicability of the doctrine, the evidence fails to establish the existence of an equitable adoption. The judgment of the court below should, accordingly, be affirmed.

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